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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 754

WILLIAM H. REDDING,

Appellant,

vs.

CITY OF LOS ANGELES, HON. FLETCHER BOWRON AS MAYOR THEREOF; C. B. HORRALL, CHIEF OF POLICE; JOSEPH F. REED, ASSISTANT CHIEF OF POLICE; JAMES F. LAWRENCE, CHARLES R. MESLOH, B. R. STEED, HENRY S. EATON, BRUCE F. CLARK, ANTHONY COLLINS, THE CIVIL SERVICE COMMISSION OF THE CITY OF LOS ANGELES, JUSTIN W. GILLETTE, ROBERT M. HIXON, IDA S. LAZARD, SAMSON A. LINDAUER, DR. FREDERIC P. WOELLNER AND L. V. McCARDLE, AS TREASURER OF THE CITY OF LOS ANGELES,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION TWO

STATEMENT AGAINST JURISDICTION ON APPEAL

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INDEX

Subject Index

	Page
I. The facts	2
II. The question	5
III. Summary of argument	6
IV. Argument	6
Point A. The purported appeal herein is irregular and invalid	6
1. The said purported appeal has not been allowed as provided by Rule 36	6
2. The appellant's jurisdictional statement does not comply with the requirements of Rule 12	7
Point B. This Court is without jurisdiction to review the judgment below upon appeal	7
1. The Supreme Court has only such jurisdictional power upon appeal as is provided by the Congress	7
2. The Congress has provided for the review on appeal of judgments of State courts only where a treaty or statute of the United States has there been declared invalid, or where appellant has there failed in his attack upon a State statute on the ground of its being repugnant to the Constitution, treaties or laws of the United States	7
3. No treaty is here involved. No statute of the United States was declared to be invalid by the judgment of the State court	8
4. The appellant did not atack any State statute on the ground of its being	

Page

repugnant to the Constitution, treaties, or laws of the United States 8

Point C. If this proceeding be viewed as a petition for a writ of certiorari, such writ does not lie, for the reason that there is no substance to the alleged Federal question upon which the decision of this cause is asserted to depend 9

1. The appellant's discharge could not be set aside unless he had an absolute statutory right to reemployment 10
2. No such absolute right to reemployment was given to the appellant by Charter Section 17 10
3. No such absolute right to reemployment was given to the appellant by the provisions of the Merchant Marine Act 11
4. No such absolute right to reemployment was given to the appellant by Public Law No. 87 12

V. Conclusion 15

TABLE OF AUTHORITIES CITED

Constitutional Provisions Cited:

Constitution of the United States, Art. III, Sec. 2 7

TABLE OF CASES CITED

Baker v. *United States*, 27 F. (2d) 863 14
Butler v. *Pennsylvania*, 10 How. 402, 13 L. Ed. 472 ... 12
Cronin v. *Civil Service Comm.*, 71 Cal. App. 633, 236 Pac. 339 10
Cummings v. *Missouri*, 4 Wall. 277, 18 L. Ed. 356 ... 12
Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282, 42 S. Ct. 106, 66 L. Ed. 239 9
Ferry v. *King County*, 141 U. S. 668, 673, 12 S. Ct. 128, 35 L. Ed. 895 8

Page

Hopkins Federal S. & L. Assn. v. *Cleary*, 296 U. S. 315, 332, 56 S. Ct. 235, 80 L. Ed. 251, 100 A.L.R. 1403 8
In re Goodell, 57 N.Y.S. (2d) 754 11
Kotch v. *River Port Pilots*, 91 L. Ed. 826 12
License Tax Cases, 5 Wall. 462, 18 L. Ed. 497 14
Missouri v. *Missouri Pac. Ry. Co.*, 292 U. S. 13, 15, 54 S. Ct. 569, 78 L. Ed. 1087 7
Newton v. *Mahoning County*, 100 U. S. 548, 25 L. Ed. 710 12
Oklahoma v. *U. S. Civil Service Comm.*, 91 L. Ed. 537 12
Redding v. *City of L. A.*, 81 Adv. Cal. App. Reports 1055 ..... 3, 11
Taylor v. *Beckham*, 178 U. S. 548, 44 L. Ed. 1187 ..... 11, 12
Twin City Pipe Line Co. v. *Harding Glass Co.*, 283 U. S. 353, 75 L. Ed. 1112 14
United States v. *Lynch*, 137 U. S. 280, 285, 11 S. Ct. 114, 34 L. Ed. 700 8
Wilson v. *North Carolina*, 169 U. S. 586, 42 L. Ed. 865 ..... 11, 12

TABLE OF STATUTES CITED

Act of Jan. 31, 1928, Chap. 14, 45 Stat. 54 8
Jud. Code, Sec. 237(a) 8
Jud. Code, Sec. 237(b) 8, 11
Los Angeles City Charter, Sec. 17 ..... 3, 4, 10
Los Angeles City Charter, Sec. 202 5
Merchant Marine Act, Title 46, Sec. 1101, U.S.C. 11
Public Law No. 87, Title 50, Sec. 1472 U.S.C. Appendix 5, 10, 15

ENCYCLOPEDIAS AND OPINIONS CITED

11 American Jurisprudence, p. 814 13
5 California Jurisprudence, pp. 670, 671 14
Opinions of Atty. Gen., N. Y., 1942, p. 395 11

RULES OF THE SUPREME COURT CITED

Rule 12 ..... 2, 6, 7
Rule 36 6

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

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WILLIAM H. REDDING,

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vs.

CITY OF LOS ANGELES, HON. FLETCHER BOWRON AS MAYOR THEREOF; C. B. HORRALL, CHIEF OF POLICE; JOSEPH F. REED, ASSISTANT CHIEF OF POLICE; JAMES F. LAWRENCE, CHARLES R. MESLOH, B. R. STEED, HENRY S. EATON, BRUCE F. CLARK, ANTHONY COLLINS, THE CIVIL SERVICE COMMISSION OF THE CITY OF LOS ANGELES, JUSTIN W. GILLETTE, ROBERT M. HIXON, IDA S. LAZARD, SAMSON A. LINDAUER, DR. FREDERIC P. WOELLNER AND L. V. McCARDLE, AS TREASURER OF THE CITY OF LOS ANGELES,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION TWO

STATEMENT AGAINST JURISDICTION ON APPEAL

MAY IT PLEASE THE COURT:

The appellees suggest that this Court is without jurisdiction to review the above entitled cause on appeal,

and in support of such suggestion respectfully represent:

A

The Purported Appeal Herein Is Irregular and Invalid

The appeal has not been allowed in accordance with the requirements of Rule 36, and the appellant's jurisdictional statement does not conform with the requirements of Rule 12.

B

This Court Is Without Jurisdiction to Review the Judgment Below upon Appeal

No treaty or statute of the United States was declared invalid by such judgment, nor was any State statute there sustained against attack on Federal grounds.

C

If This Proceeding Be Viewed as a Petition for a writ of Certiorari, Such Writ Does Not Lie, for the Reason That There Is No Substance to the Alleged Federal Question upon Which the Decision of This Cause Is Asserted to Depend.

The appellant has no substantial claim that any Federal right or privilege was affected by the judgment below; indeed, the judgment below not only adequately, but entirely, rests upon State grounds.

In further support of such suggestion, the appellees respectfully state:

I

The Facts

The purported appeal herein is from a decision of the District Court of Appeal of the State of California, Second

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Appellate District, Division Two, affirming a judgment for the appellees and denying relief to the appellant in an action for a writ of mandate brought by the appellant against the appellees in the Superior Court of the Sate of California in and for the County of Los Angeles. The opinion of the District Court of Appeal is reported in 81 Advance California Appellate Reports at page 1055, and in 185 Pacific Reporter, 2d series, at page 430, and is attached to the appellant's jurisdictional statement as Appendix "A".

Mandamus had been sought in the Superior Court action to compel the appellees (the respondents there) to restore the appellant (the petitioner there) to a position, from which he had been discharged, in the Los Angeles police department. The appellees had demurred to the mandamus petition upon the ground that it stated no cause of action. The Superior Court had sustained the demurrer and entered its judgment for the appellees.

The facts of the case as disclosed by the mandamus petition were as follows: On September 6, 1942, the appellant was given military leave from his duties as an officer of the Los Angeles police department for the reason that he had been commissioned as an officer in the coast guard and ordered to active duty therein. On December 9, 1942, the appellant was honorably disenrolled from the coast guard and on the same day he shipped in the civilian crew aboard an army transport.

Thereafter, on January 9, 1943, the appellant enrolled in the United States Maritime Service, and after his disenrollment therefrom, he received a certificate from the War Shipping Administrator attesting to substantially continuous service in the merchant marine between January 9, 1943, and March 29, 1946.

Under the provisions of Section 17 of the Charter of the City of Los Angeles, (Chap. 67 Statutes of California 1941, p. 3405) as it read until 1945, a Los Angeles policeman

"called into active service in the armed forces of . . . the United States" during the war was considered as being on military leave of absence "during the period of such service . . . and for a period of ninety (90) days from and after his discharge or release from such service" and was entitled to return to his position within the time so designated. (The provisions of the said Section 17 are set forth verbatim by the appellant in Appendix "C" of his jurisdictional statement.)

The appellant was at no time during the war on active service in the armed forces of the United States, except as above stated. He did not apply for return to his position as a policeman until after February 1, 1946, more than three years after his release from active service in the armed forces. (One of the appellant's contentions seems to be that his employment in the merchant marine was active service in the armed forces of the United States. With this contention, of course, we do not agree.)

On August 3, 1943, a hearing was held by a Los Angeles police department board of rights, as provided by Section 202 of the City Charter, upon charges preferred by the Chief of Police that the appellant was guilty of neglect of duty for failure to return to duty within the time allowed him under the military leave provisions of Charter Section 17. The board of rights found the appellant guilty and recommended his removal, and thereupon the Chief of Police discharged the appellant from the police department. In February, 1946, the appellant asked the Chief of Police to allow him a rehearing. This request was granted, the previous proceedings were set aside, and the matter was heard before a new board of rights. At this hearing the appellant was present in person and by counsel. The new board found the appellant guilty as charged, and on April 30, 1946, recommended his discharge, whereupon the Chief of Police removed the appellant from the police department.

(The provisions of the said Section 202 of the Los Angeles City Charter are set forth verbatim by the appellant in Appendix "C" of his jurisdictional statement.)

For the purposes of this appeal, we shall treat the appellant's request to the Chief of Police for a rehearing by a board of rights as equivalent to a request by the appellant that he be restored to his former position as a city policeman.

Under the provisions of Public Law No. 87, Section 1472 of Title 50, Appendix U. S. C. (appellant's jurisdictional statement, Appendix "B") it is declared that as to a person like the appellant who left a position in the employ of a city to enter active military or naval service in the land or naval forces of the United States, was honorably discharged therefrom, and within thirty days thereafter entered upon service in the merchant marine, it is the "sense of the Congress" that he should be restored to his position with the city upon his return from service with the merchant marine.

II

The Question

Is a former city employee, as a matter of absolute right, under Federal law, entitled to be restored to the position with a city which he left to enter the armed forces, where, after his release from the armed forces, he failed to return to his position within the period stipulated by state law, but instead served with the merchant marine for three years before he requested that he be restored to his position with the City?

III

Summary of Argument

Point A. *The Purported Appeal Herein Is Irregular and Invalid.*

The appeal has not been allowed in accordance with the requirements of Rule 36, and the appellant's jurisdictional statement does not conform with the requirements of Rule 12.

Point B. *This Court Is Without Jurisdiction to Review the Judgment Below upon Appeal.*

No treaty or statute of the United States was declared invalid by such judgment, nor was any state statute there sustained against attack on Federal grounds.

Point C. *If This Proceeding Be Viewed as a Petition for a Writ of Certiorari, Such Writ Does Not Lie, for the Reason That There Is No Substance to the Alleged Federal Question upon Which the Decision of This Cause Is Asserted to Depend.*

The appellant has no substantial claim that any Federal right or privilege was affected by the Judgment below; indeed, the judgment below not only adequately, but entirely, rests upon state grounds.

IV

Argument

Point A. *The Purported Appeal Herein Is Irregular and Invalid.*

1. The said purported appeal has not been allowed, as provided by Rule 36, by the Chief Justice of the Supreme

Court of California, which is the state court of last resort in this cause, nor has any appeal herein been allowed by a Justice of this Court.

2. The jurisdictional statement filed by the appellant with his petition to the California District Court of Appeal for allowance of his appeal does not comply with the requirements of Rule 12 that such "statement shall include a statement of the grounds upon which it is contended the questions involved are substantial . . . , specify the stage in the proceedings in the court of first instance, and in the appellate court, at which, and the manner in which, the Federal questions sought to be reviewed were raised; the method of raising them . . .; and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears, . . . as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this court."

Point B. *This Court Is Without Jurisdiction to Review the Judgment Below upon Appeal.*

1. *The Supreme Court has only such jurisdictional power upon appeal as is provided by the Congress.*

Constitution of the United States, Art. III, Sec. 2;
Missouri v. *Missouri Pac. Ry. Co.*, 292 U. S. 13, 15, 54 S. Ct. 569, 78 L. Ed. 1087.

2. *The Congress has provided for the review on appeal of judgments of state courts only where a treaty or statute of the United States has there been declared invalid, or where the appellant has there failed in his attack upon a*

state statute on the ground of its being repugnant to the Constitution, treaties or laws of the United States.

Jud. Code, Sec. 237(a) (Title 28, Sec. 344(a) U. S. C.); *Act of Jan. 31, 1928,* Chap. 14, 45 Stat. 54 (as amended by Act of April 26, 1928, Chap. 440, 45 Stat. 466).

3. *No treaty is here involved. No statute of the United States was declared to be invalid by the judgment of the state court.*

(a) The validity of a Federal statute is drawn in question when the existence, or constitutionality, or legality of such statute is denied, and the denial forms the subject of direct inquiry.

United States v. *Lynch,* 137 U. S. 280, 285, 11 S. Ct. 114, 34 L. Ed. 700

(b) The validity of a Federal statute is not denied by the mere denial of rights claimed under it, where such denial results merely from construction of the statute and its application to the facts of the case.

Perry v. *King County,* 141 U. S. 668, 673, 12 S. Ct. 128, 35 L. Ed. 895.

(c) Such denial in a state court of rights claimed under a Federal statute can be reviewed by the Supreme Court only on certiorari and not on appeal.

Jud. Code, Sec. 237(b) (Title 28, Sec. 344(b) U. S. C.); *Hopkins Federal S. & L. Ass'n* v. *Cleary,* 296 U. S. 315, 332, 56 S. Ct. 235, 80 L. Ed. 251, 100 A.L.R. 1403.

4. *The appellant did not attack any state statute on the ground of its being repugnant to the Constitution, treaties, or laws of the United States.*

(a) There is no showing, attempted or otherwise, by the appellant in his jurisdictional statement, and it is not the

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fact, that the appellant at any time in the cause below claimed that any state statute was invalid, or claimed that the application, or enforcement, as to him, of any such statute, was repugnant to the Constitution or to Federal statute and therefore void.

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282, 42 S. Ct. 106, 66 L. Ed. 239.

(b) Far from attacking any state statute, the appellant's case was based upon a state statute (Sec. 17, Los Angeles City Charter, *supra*, p. 4, appellant's jurisdictional statement, Appendix "C"). So far as the state statute was concerned (and, as well, so far as the Federal statutes were concerned) the problems at issue were entirely of construction and not of validity.

(c) There was in the court below no application or enforcement of a state statute against the appellant, to his disadvantage and in abridgement of any of his rights under Federal law. The state court's decision was, rather, that no state statute was of any help to the appellant. Such a holding could not be said to deny any Federal right, for if the appellant, under the facts of this case, had any Federal right of reemployment, he had it without reference to any statute of the state.

(d) If there was any denial of Federal right, review must be by certiorari and not by appeal.

Point C. *If This Proceeding Be Viewed as a Petition for a Writ of Certiorari, Such Writ Does Not Lie, for the Reason That There Is No Substance to the Alleged Federal Question upon Which the Decision of This Cause Is Asserted to Defend.*

1. *The appellant's discharge could not be set aside unless he had an absolute statutory right to reemployment.*

The discharge of the appellant from his position was effected in accordance with the provisions of the City Charter after a hearing by, and upon the recommendation of, a police department board of rights. The state court held that there was no such showing of abuse of discretion by that board as would authorize the court to substitute its judgment for that of the board. The only question in the case, then, was did the appellant have an absolute right, under either State or Federal law, to be restored to his position? If he did, then any consideration of the cause for his discharge, the proceedings before the board of rights, and all emotional considerations, became irrelevant, and the appellant's discharge was nugatory. If the appellant did not have such absolute right, his discharge by the Chief of Police was final.

If there were such absolute right, it had to arise from statute, for otherwise the right of the appellant's superior to discharge him would be complete and unimpeachable. (*Cronin* v. *Civil Service Comm.*, 71 Cal. App. 633, 236 Pac. 339.) The statutes relied upon by the appellant are Section 17, Los Angeles City Charter, The Merchant Marine Act, and Public Law 87.

2. *No such absolute right to reemployment was given to the appellant by Charter Section 17.*

Section 17 of the Los Angeles City Charter (*supra*, p. 4, appellant's jurisdictional statement, Appendix "C") applied only to those employees who returned to their jobs within ninety days after their release from active service in the armed forces of the United States, and the appellant's

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service in the merchant marine was not service in the armed forces.

Opinion below, 81 Adv. Cal. App. Reports, 1055;
In re Goodell, 57 N.Y.S. (2d) 754;
Opinions of Att'y Gen., N. Y., 1942, p. 395.

(a) Even though this Court, had it been sitting as the state court, would have reached a different conclusion on the construction of the state law, the conclusion reached by the state court is binding on this Court and is not reviewable here.

Taylor v. *Beckham*, 178 U. S. 548, 44 L. Ed. 1187;
Wilson v. *North Carolina*, 169 U. S. 586, 42 L. Ed. 865.

(b) To be reviewable here, as on certiorari, there must be a showing of deprivation of a right secured by the Constitution or laws of the United States. No such right could arise from a city charter.

Jud. Code, Sec. 237(b) (Title 28, Sec. 344(b) U. S. C.)

3. *No such absolute right to reemployment was given to the appellant by the provisions of the Merchant Marine Act (Title 46, Sec. 1101, appellant's jurisdictional statement, Appendix "F").*

The appellant relies upon the statement contained in the Merchant Marine Act that it is the policy of the United States to foster the development of a privately owned merchant marine, manned with citizen personnel and "capable of serving as a naval and military auxiliary in time of war." On the basis of that statement, he asks this Court to hold that civilian personnel in the merchant marine have an absolute right to reemployment in former city jobs upon their disenrollment from the merchant marine.

The Act upon which such reliance is placed was adopted before the inception of the war, and is not concerned with any question of reemployment.

4. *No such absolute right to reemployment was given to the appellant by Public Law No. 87.*

Public Law No. 87 (*supra* p. 6, appellant's jurisdictional statement, Appendix "B"), by its terms, expresses merely the "sense of the Congress" that city employees should be restored to their positions upon their return from service with the merchant marine.

(a) The words of the statute can by no means be twisted into the creation of an absolute right of city employees to such reemployment.

(b) The reason that the Congress enacted this portion of the act as a recommendation instead of as a mandate was possibly because the Congress considered that it was without power to enact any such mandate. This is probably true.

Kotch v. *River Port Pilots*, 91 L. Ed. 826 (Adv. Op. 3/31/47), 330 U. S. 552;
Oklahoma v. *U. S. Civil Service Comm.*, 91 L. Ed. 537, (Adv. Op. 2/10/47), 330 U. S. 127.
Taylor v. *Beckham*, 178 U. S. 548, 44 L. Ed. 1187;
Wilson v. *North Carolina*, 169 U. S. 586, 42 L. Ed. 865;
Newton v. *Mahoning County*, 100 U. S. 548, 25 L. Ed. 710;
Cummings v. *Missouri*, 4 Wall. 277, 18 L. Ed. 356;
Butler v. *Pennsylvania*, 10 How. 402, 13 L. Ed. 472.

(c) However that may be, in the act in question the Congress did not attempt to exercise any such power, and this Court could not now declare that a policy suggested by the Congress has the effect of declared law and is binding upon

the states as a matter of law. When Congress merely expresses a hope or wish that the states will conform, such expression cannot be construed as though it were mandatory and binding, especially where Congress in language as clear and unambiguous as could be found, negatives any such intention.

The cases believed by the appellant to sustain jurisdiction herein are not in point. They stand for the proposition that when the Constitution or the Congress declare or create a *right* state courts cannot refuse to enforce the *right* arising from the law of the United States because of conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers, and that rights arising from the Constitution or under any act of Congress may be enforced as of right in the courts of the states. This principle has no application to the case at bar for the very good reason that in Public Law 87 Congress meticulously refrained from creating any right so far as employees of states and political subdivisions thereof were concerned. Congress left it to the states and their subdivisions, through legislative action, to determine the policy to be followed with reference to their employees.

(d) The adoption by the states or their political subdivisions of the policy expressed by Congress in Public Law 87 is a matter for legislative, rather than judicial, determination.

This principle, which has been followed uniformly by courts throughout the United States, is aptly and concisely expressed in the following language quoted from 11 American Jurisprudence, at page 814:

> "The public policy of a state is to be found in its constitution and statutes. Only in the absence of any declaration in these instruments may it be determined

> from judicial decisions. In order to ascertain the public policy of a state with respect to any matter, the acts of the legislative department should be looked to, because a legislative act, if constitutional, declares in terms the policy of the state and is final so far as the courts are concerned." (Citing *Northern Pac. Ry. Co.* v. *Richland County* (North Dakota, 1914), 148 N. W. 545 at 547, and other cases.)

In the License Tax Cases, 5 Wall. 462, 18 L. Ed. 497, it was urged that certain statutes were against public policy. Speaking for the court, Chief Justice Chase said:

> "This court can know nothing of public policy, except from the Constitution and the laws, and the course of administration and decision. It has no legislative powers. It cannot amend or modify any legislative acts. It cannot examine questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort must, in general, be addressed to the Legislature. Questions of policy, determined there, are concluded here."

In *Twin City Pipe Line Co.* v. *Harding Glass Co.*, 283 U. S. 353, 75 L. Ed. 1112, this court said:

> "Primarily it is for the lawmakers to determine the public policy of the State."

In *Baker* v. *United States,* 27 F. (2d) 863, (certiorari denied, 278 U. S. 656, 73 L. Ed. 565) the court said:

> "We must hold, then, that the decision of Congress is the final word in reference to what constitutes public policy in all matters confided to it by the Constitution or law."

5 California Jurisprudence, at pages 670 and 671, contains the following:

> "The power to determine what is necessary and appropriate legislation to accomplish the ends of gov-

ernment must necessarily be lodged in some body or department, and, by the same necessity, that body must be the legislature, or the law-making power. What is for the public good, and what are public purposes, are questions which the legislature must decide upon its own judgment, in respect to which it is vested with a large discretion which cannot be controlled by the courts except perhaps where its action is clearly evasive . . .

"Nonaction of Legislature.—Though it is within the legitimate power of the judiciary to declare the action of the legislature unconstitutional where that action exceeds the limits of the supreme law, yet the courts have no means, and no power, to avoid the effects of nonaction. The legislature being the creative element in the system, its action cannot be quickened by the other departments."

So here neither the Legislative authority of the state, in the Los Angeles City Charter, nor the national legislature, in Public Law No. 87, created any right in the appellant to be reemployed after his return from service in the merchant marine. Each of them did make certain provisions for reemployment after absences arising out of the war, and it must be assumed that they provided for all classes of former employees which they wished to benefit or protect, and deliberately omitted to extend such benefits further. The legislature having so omitted to act, the appellant now asks this Court to create such right of reemployment in him. This the Court cannot do, for its has no legislative power.

V

Conclusion

There is no jurisdiction in this Court to review the judgment of the court below on appeal and, if the matter should

be regarded as before this Court on certiorari, no Federal question of substance is presented.

Respectfully submitted,

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